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Nos. 78-1902, 78-1905 and 79-221 MICHAEL BOIAK, JR., CLERK

In the Supreme Court of the United States**OCTOBER TERM, 1979**

**INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, PETITIONERS**

v.

CONSOLIDATED EXPRESS, INC., ET AL.

**NEW YORK SHIPPING ASSOCIATION, INC., ET AL.,
PETITIONERS**

v.

CONSOLIDATED EXPRESS, INC., ET AL.

**CONSOLIDATED EXPRESS, INC., ET AL.,
CROSS-PETITIONERS**

v.

NEW YORK SHIPPING ASSOCIATION, INC., ET AL.

**ON PETITIONS AND CROSS-PETITION FOR
A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE**

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**MEMORANDUM FOR THE UNITED STATES
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This memorandum is submitted in response to the Court's invitation of October 9, 1979.

I. Petitioners International Longshoremen's Association ("ILA") and New York Shipping Association ("NYSA") negotiated Rules on Containers ("Rules") as part of their 1969 collective bargaining agreement. The

rules provided that all consolidated less-than-container-load ("LCL") or less-than-trailer load ("LTL") cargoes shipped from, or to be shipped to, a point within 50 miles of docks located in New York would be loaded or unloaded ("stuffed" or "stripped") by longshoremen at dockside (Pet. App. 6a). Carriers who failed to comply were subjected to penalties. *Ibid.* Respondents Consolidated Express ("Conex") and Twin Express ("Twin") are companies which, using Teamsters union labor, consolidate freight in containers for ocean shipment between New York and Puerto Rico.

The NYSA's failure to enforce the Rules led to a supplementary agreement ("Dublin Supplement") in January 1973 (Pet. App. 7a). In accordance with the Dublin Supplement, vessel owners using ILA labor (including petitioner Sea-Land) began stripping and restuffing containers previously stuffed by Conex and Twin, and refused to furnish Conex and Twin with empty containers (Pet. App. 8a). NYSA and ILA then issued a joint statement to NYSA members that Conex, Twin and other consolidators were operating in violation of the Rules. *Ibid.*

In June 1973, Conex and Twin filed charges with the National Labor Relations Board ("Board") (Pet. App. 8a). The Board held that of the Rules and their enforcement by the ILA constituted an unfair labor practice under Sections 8(e) and 8(b)(4)(ii)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(e) and 158(b)(4)(ii)(B). *Consolidated Express, Inc.*, 221 N.L.R.B. 956 (1975), enforced, *International Longshoremen's Association v. NLRB*, 537 F. 2d 706 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977).

After conclusion of the NLRB proceedings, Conex and Twin filed a complaint in the district court claiming that

enforcement of the Rules and Dublin Supplement constituted both a group boycott in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and a violation of Section 303(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. 187(a) (Pet. App. 11a). Actual damages were claimed for the alleged LMRA violation and treble damages were claimed for the alleged antitrust violation. Conex and Twin moved for partial summary judgment on the ground that the NLRB decision, enforced by the Second Circuit, established all of the material facts on the issue of liability (Pet. App. 11a-12a). The district court denied the motion (Pet. App. 121a-122a), but certified the case for interlocutory review pursuant to 28 U.S.C. 1292(b) (Pet. App. 126a-127a).

The court of appeals reversed the district court's order denying partial summary judgment on the LMRA claim (Pet. App. 4a). It found that the NLRB's prior adjudication of an unfair labor practice collaterally estopped relitigation of liability (Pet. App. 15a-22a). It further held that the action was not barred by the statute of limitations (Pet. App. 22a-26a), by possible violations of the Interstate Commerce Act (*id.* at 26a-29a), or by the doctrines of estoppel en pais, laches or equitable estoppel (*id.* 29a-33a).

On the antitrust issue the court held that an agreement which violates Section 8(e) of the NLRA forfeits any claim to labor immunity from the antitrust laws, insofar as the plaintiff seeks injunctive relief. It thus concluded that partial summary judgment would be proper on an injunctive claim, because of the "significant and uncontested" anticompetitive effect of the Rules and the Dublin Supplement (Pet. App. 47a). It held, however, that, where a claim for treble damages is made, the defendants might still assert a labor exemption as an

affirmative defense if they could make a three-fold showing (Pet. App. 51a). They must show that: (1) "they could not reasonably have foreseen that the subject matter of the agreement being challenged would be held to be unlawful under §8(b)(4) or § 8(e) * * *"; (2) the contract provisions and their enforcement "were 'intimately related' to the object of collective bargaining thought at the time to be legitimate * * *"; and (3) the provisions and their implementation "went no further in imposing restraints in the secondary market than was reasonably necessary to accomplish it" (Pet. App. 54a). Finally the court concluded that, in the absence of a labor exemption, the agreements involved in this case, as implemented by petitioners, constituted group boycotts and as such were per se violations of the antitrust laws (Pet. App. 56a). Since, however, neither the parties nor the district court had addressed all the factual issues pertinent to the three-part exemption test, the court of appeals remanded for trial (Pet. App. 55a).

2. The proper scope of the labor exemption from the antitrust laws has been a vexing issue for decades. In this case the court of appeals formulated a new test for the labor exemption where the challenged anticompetitive conduct has previously been found to violate the labor laws. All parties contend that the court committed significant error in shaping this exemption.¹ Although these arguments are not without force, they are premature, for the decision is interlocutory and remands the case for trial. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967). The contours of the court of appeals' antitrust

¹Petitioners ILA and NYSA also contend that the court erred in treating their agreement as a boycott illegal per se under Section 1 of the Sherman Act (No. 78-1905 Pet. 17-19).

exemption test can best be determined upon review of a full trial record which demonstrates its practical application. See *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976).

Developments subsequent to the court of appeals' decision make current review particularly inadvisable. The predicate of the decision is the Board's 1975 determination that the Rules and their implementation constituted an unfair labor practice (Pet. App. 8a-11a, 15a-22a, 34a-35a, 55a, 57a). Recently, however, another court of appeals has held that the Board, acting on a complaint involving the same container Rules, incorrectly concluded that the Rules violate federal labor law. *International Longshoremen's Association v. NLRB*, Nos. 77-1735, 77-1758, 78-1510 (D.C. Cir. Sept. 25, 1979), petition for rehearing en banc filed October 19, 1979.² The eventual outcome of that case could fundamentally affect the present litigation. If the decision of the District of Columbia Circuit is not reversed by the court sitting en banc or by this Court on subsequent review, it could have a direct bearing on the application of the labor exemption standard fashioned by the Third Circuit, either at the trial level or on further review in the court of appeals. In any event, until the validity of the Board's interpretation of Sections 8(e) and 8(b)(4) is settled, this Court should not review the implications of that interpretation under the antitrust laws.

²The decision is reproduced as an addendum to the Supplemental Brief For Petitioners in Nos. 78-1902 and 78-1905.

It is therefore respectfully submitted that the petitions
for a writ of certiorari should be denied.

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NOVEMBER 1979

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